Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

D. DEAN BIBLES, OREGON STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, PETITIONER

v.

OREGON NATURAL DESERT ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Exemption 6 of the Freedom of Information Act, 5 U.S.C. 552(b)(6), which allows an agency to withhold information if disclosure "would constitute a clearly unwarranted invasion of personal privacy," protects from disclosure a mailing list used by the Bureau of Land Management to distribute to private individuals a newsletter about the agency's activities.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of D. Dean Bibles, Oregon State Director of the Bureau of Land Management, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 83 F.3d 1168. The opinion and orders of the district court (App., *infra*, 11a-24a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1996. A petition for rehearing was denied on

August 7, 1996. App., *infra*, 25a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides, in subsection (a), that "[e]ach agency shall make available to the public" certain specified types of information according to certain detailed procedures set forth in the Act. See 5 U.S.C. 552(a)(1)-(6). Subsection (b) of Section 552 states, in relevant part:

> This section does not apply to matters that are—
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
>
> * * * * *
>
> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

5 U.S.C. 552(b).

STATEMENT

1. Respondent, the Oregon Natural Desert Association (ONDA), is a non-profit, public interest group that describes its purpose to be "promoting proper management and restoration of the Oregon high desert." C.A. E.R. 2.[1] Respondent has approximately 200 members and pursues its purpose through, *inter alia*, direct mailings to "potentially concerned citizens." *Id.* at 2-3. On August 13, 1992, respondent submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a), to the Oregon state office of the Bureau of Land Management (BLM) seeking disclosure of the mailing list used by the BLM to distribute the *BLM News*. App., *infra*, 12a.

[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals.

The *BLM News* is a newsletter containing articles written by BLM employees describing actions and policies of the BLM in Oregon and Washington. App., *infra*, 2a. The *BLM News* mailing list consists of approximately 4500 names and addresses that are maintained on a number of separate lists. *Id.* at 13a. The mailing list includes persons and business entities who have asked to be placed on the mailing list, as well as those who appear to have an interest in BLM activities (including, *e.g.*, BLM retirees). The list has never been released to the public. See *id.* at 12a.

In its FOIA request, respondent asserted that the BLM provides "only one point of view." C.A. E.R. 10. In describing the purpose of its request, respondent stated that it "intends to provide balance by use of the mailing list for those people who receive the BLM's publication," and that it "intends to make the mailing list available to other public interest groups who share similar goals." *Ibid.* Petitioner D. Dean Bibles, the BLM Oregon State Director, denied the FOIA request, explaining that the *BLM News* mailing list is protected by Exemption 6 of the FOIA (5 U.S.C. 552(b)(6)), which allows an agency to withhold files the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." App., *infra*, 2a.[2]

[2] The BLM had used an additional list to distribute the particular issue of the *BLM News* that was referenced by respondent's FOIA request. App., *infra*, 12a. The additional list consisted of the mailing list it ordinarily used to distribute the Western Oregon District Regional Management Plans. Petitioner released that list to respondent on November 3, 1992, in light of the fact that it has been

Respondent pursued an administrative appeal to the Department of the Interior. On that appeal, respondent stated that it "planned to educate the recipients of the BLM NEWS that the Oregon high desert is threatened and the BLM is mismanaging this natural resource," and that it was "interested in enlisting the readers of the BLM NEWS in the effort to save these lands' primitive and pristine character." C.A. E.R. 18. The Department of the Interior denied the appeal in part and granted it in part. App., *infra*, 2a. It concluded that Exemption 6 of the FOIA protects from disclosure the names and addresses of private individuals on the mailing list, because disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 12a. It also concluded, however, that Exemption 6 does not protect addresses of organizations, business entities, and individuals listed in their official or representative capacities. *Id.* at 12a-13a. The BLM subsequently released the list containing approximately 3000 names and addresses of organizations, business entities, and individuals listed in their official and representative capacities. Gov't C.A. Br. 6, n.4.

2. On July 23, 1993, respondent filed suit, in the United States District Court for the District of Oregon, to compel disclosure of the complete *BLM News* mailing list. App., *infra*, 13a. Respondent claimed that it "wishes to distribute information about the effects of BLM decisions and ONDA initiatives regarding BLM lands to individuals on the *BLM News* mailing list." C.A. E.R. 3.

The district court granted respondent's motion for summary judgment and ordered release of the complete mailing list. The court applied a four-factor test, set forth in the then-current Ninth Circuit precedent of *FLRA* v.

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maintained as part of the public record, pursuant to federal regulation. *Ibid.*; see C.A. E.R. 11.

United States Department of Navy, 958 F.2d 1490, 1494-1496 (1992) (*FLRA* v. *Navy*) (subsequently withdrawn, 22 F.3d 898 (1994)), that required a weighing of: (1) the plaintiff's interest in disclosure; (2) the public's interest in disclosure; (3) the degree of invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information. App., *infra*, 15a. The court rejected the government's argument that, in light of *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the first factor of the Ninth Circuit's *FLRA* v. *Navy* test must be eliminated because this Court had made clear that the identity of the requester has no bearing on the merits of a FOIA request. The district court acknowledged that the government's argument was supported by the decisions of several courts of appeals. App., *infra*, 16a. But the court adhered to the Ninth Circuit's ruling in *FLRA* v. *Navy*, which had found *Reporters Committee* "sufficiently distinguishable to justify continued reliance upon its four-factor test, including the first factor regarding the nature of the plaintiff's interest in disclosure." *Id.* at 16a & n.2.[3]

Applying the Ninth Circuit's four-factor test, the district court concluded that the government failed to meet its burden of justifying nondisclosure under FOIA Exemption 6. App., *infra*, 17a-21a. First, the court emphasized

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[3] The district court noted "that the Ninth Circuit's decision in [*FLRA* v. *Navy*], 958 F.2d 1490, is part of a nationwide split amongst the Circuit Courts regarding disclosure of employees' home addresses to union representatives and bargaining units," and that this Court had granted review to resolve that issue in *FLRA* v. *United States Dep't of Defense*, 975 F.2d 1105 (5th Cir. 1992) (subsequently reversed by this Court in *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487 (1994)). App., *infra*, 16a n.2. The district court stated, however, that, "because the Ninth Circuit has issued a final decision," it could "not consider the government's claim that the case is 'wrongly decided.'" *Ibid.*

that respondent's interest in disclosure was noncommercial and that respondent had a "desire to 'educate' and influence those on the list by presenting its own views and information to a select audience." *Id.* at 15a, 16a, 18a.[4]

Second, the district court found "some merit" in the proposition that the public interest part of the balancing test may include a general interest in "an informed citizenry." App., *infra*, 18a. At the same time, the court was "cognizant of the alternative view that mailing lists actually reveal very little, if anything, about the inner workings of government—the primary target of the FOIA amendment." *Id.* at 18a-19a, citing *FLRA* v. *United States Dep't of Defense*, 984 F.2d 370, 375 (10th Cir. 1993) (holding that disclosure of home addresses "has 'nothing' to do with FOIA's interest in public scrutiny of government").

Third, the court concluded that the invasion of privacy that would result from disclosure of the mailing list in this case was minimal because one's presence on the list would not be embarrassing or private. App., *infra*, 19a; see also *id.* at 20a, citing *Southern Utah Wilderness Alliance, Inc.* v. *Hodel*, 680 F. Supp. 37 (D.D.C. 1988). The court minimized the government's concern that persons on the list would, after disclosure, be subject to unwanted mailings, reasoning that "the majority of the people have initiated the receipt of mailings from the BLM." App., *infra*, 19a. The court contrasted those circumstances with cases in which the requested mailing lists constituted employee rosters—*e.g.*, *National Ass'n of Retired*

[4] The court found inadequate respondent's proffered interest in "providing information about the geographic reach of the BLM's information net and the nature and extent of the BLM's dissemination activities." App., *infra*, 17a. The court found that "such an inquiry could readily be answered by the BLM with statistical information regarding the number of individuals on its mailing list along with a list of cities and zip codes." *Id.* at 17a-18a.

Federal Employees v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (*NARFE*) (privacy interest in home addresses "significant"), cert. denied, 494 U.S. 1078 (1990); *FLRA* v. *Navy*, 958 F.2d at 1496. The court found that, in the instant case, "persons included on the BLM mailing list have already opened their mail boxes to the receipt of information about BLM activities to a certain extent." App., *infra*, 19a.

Fourth, the court noted that the parties did not dispute that respondent had no alternative means of obtaining the requested information. App., *infra*, 19a-20a.[5]

Concluding that disclosure would not constitute a clearly unwarranted invasion of privacy, the court granted respondent summary judgment and ordered the BLM to disclose the complete *BLM News* mailing list. App., *infra*, 21a, 23a. The district court stayed its order pending petitioner's appeal. *Id.* at 2a.

3. a. A divided panel of the Ninth Circuit affirmed. App., *infra*, 1a-10a. As a threshold matter, the court noted the government's contention that, in light of *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487 (1994) (*Defense* v. *FLRA*), the court should not consider the first factor of the Ninth Circuit's *FLRA* v. *Navy* test—the plaintiff's particular interest in disclosure. App., *infra*, 4a-5a. The court of appeals acknowledged that, in *Defense* v. *FLRA*, this Court had affirmed its decision in *Reporters Committee* and held that, under the FOIA, "the only relevant interest in disclosure is the public's interest in understanding government operations or activities." *Id.* at 5a,

[5] The court sought to distinguish *Reporters Committee* as involving significant privacy interests, and *FLRA* v. *Navy* as involving a significant public interest in collective bargaining. App., *infra*, 20a. The court found that, in the instant case, both sides of the privacy interest and public interest balance "barely tip the scales." *Ibid.*

citing 510 U.S. at 495. And it noted that the district court had issued its decision prior to *Defense* v. *FLRA* and had, in fact, considered the plaintiff's interest in disclosure. The court of appeals, nonetheless, declined to reverse, stating that "the district court did not find that [respondent's] interest in disclosure was material" and consideration of that interest "did not affect the district court's decision in this case." App., *infra*, 6a. Rather, as the court of appeals saw it, the district court had merely relied on the "general public interest in knowing what the government is doing." *Ibid.*

The court of appeals then addressed another interest, first advanced as a "public interest" by respondent on appeal, in "knowing to whom the government is directing information, or as [respondent] characterizes it, 'propaganda,' so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light." App., *infra*, 6a. The court of appeals credited that interest and therefore concluded that there was more than a minimal public interest served by disclosure in this case. *Ibid.*

Turning to the other side of the balance, the court of appeals agreed with the district court that the privacy interest at stake is minimal because most of the people had requested that they be placed on the list and the mailings they were likely to receive as a result of the disclosure would involve similar subject matter. App., *infra*, 6a-7a. The court distinguished the privacy interest of the employees involved in *Defense* v. *FLRA*, who had chosen not to disclose their names and addresses to the union and who would be likely to receive union mailings and calls if their identifications were disclosed. The court concluded that the *BLM News* recipients, unlike the employees in *Defense* v. *FLRA*, had indicated an interest in "receiving

mailings on subjects related to [respondent's] interest in this case," and were unlikely to be targets of "aggressive, high stakes personal contact" upon disclosure. App., *infra*, 7a.

The court concluded that, "[b]ecause the privacy interests at stake are minimal, and because there is a significant public interest in knowing with whom the government has chosen to communicate and in providing those persons with additional information, we conclude that disclosure of the mailing list would not result in a clearly unwarranted invasion of privacy." App., *infra*, 8a.[6]

b. Judge Fernandez dissented. App., *infra*, 8a-10a. He noted that the court of appeals "[o]nce again" was being "asked to bridle at and practically ignore the FOIA teachings of the United States Supreme Court," *id.* at 8a, citing *Defense* v. *FLRA*, 510 U.S. at 495; *Reporters Committee*, 489 U.S. at 771-773, and to "allow curiosity and gain to trump privacy," App., *infra*, 8a. Judge Fernandez was "certain" that "[t]he information that a mailing list will give the public about what the government is up to is minuscule or nil, most likely the latter," since any person who wants to know what is in the *BLM News* need only ask for it. *Id.* at 9a. Thus, he concluded, respondent "does not really want to check on the government; it wants to contact the people on the list." *Ibid.*

Another "certainty," Judge Fernandez continued, "is that a list does convey more information about the recipient than a mere name and address." App., *infra*, 9a. He observed that "[i]t takes no sophisticate to perceive that the list will at least tell others that these are people who are interested in what happens to land that is controlled by

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[6] On October 18, 1996, the court of appeals granted petitioner's request for a stay of the mandate pending the filing of the instant petition.

the policies and doings of the BLM." *Ibid.* Judge Fernandez concluded that, although courts have varied in the weight they accord to the privacy interest of a person on a mailing list, "everyone agrees that it has some weight." *Id.* at 9a-10a. And he further concluded that "[c]ertainly the weight it has outweighs the nonexistent weight of the interest in public disclosure." *Id.* at 10a.

Judge Fernandez also emphasized that the "claimed purity" of respondent's motives cannot make a difference (whether it be correcting government information, fund-raising, or environmental preservation), because if respondent can get the list, anyone can. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision misconstrues Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6), disregards settled precedents of this Court, and conflicts with rulings by other courts of appeals. This Court has made clear that, in applying Exemption 6, a court must balance the "public interest" in disclosure against the "privacy interest" that Congress intended to protect through the exemption. *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). The Ninth Circuit erred in its view of the controlling legal analysis with regard to both the public interest and the privacy interest sides of the balance.

The Court has made it clear that the public interest to be weighed, for purposes of the FOIA, is limited to furthering the public's knowledge of what the government is doing. *Reporters Committee*, 489 U.S. at 773; *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495 (1994). Furthermore, whether FOIA Exemption 6 permits withholding of a requested document "cannot turn on the purposes for which the request for information is made," and

"the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Reporters Committee*, 489 U.S. at 771; *Defense* v. *FLRA*, 510 U.S. at 496. Put simply, personal privacy information is protected against mandatory disclosure if it would, in itself, "tell us nothing directly about" the conduct of government. *Reporters Committee*, 489 U.S. at 774.

Contrary to this Court's rulings, the court of appeals concluded that there was "a substantial public interest" in disclosure of the requested information in this case—the mailing list for a federal agency's local newsletter—not because of what the mailing list would reveal about the conduct of government, but because respondent intended to use it to provide individuals on the list with "information from other sources" that do not share the agency's "self-interest in presenting government activities in the most favorable light." App., *infra*, 6a. That interest cannot be squared with this Court's repeated statements that the public interest to be weighed under FOIA Exemption 6 depends on the extent to which disclosure would reveal the conduct and activities of the government itself. The court of appeals ruling also conflicts with decisions of the D.C. Circuit that have correctly recognized that the only public interest relevant to a FOIA Exemption 6 determination is whether disclosure of the mailing list would reveal what the government is doing. See, *e.g.*, *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) (*NARFE*), cert. denied, 494 U.S. 1078 (1990).

With regard to the privacy interests at stake, this Court recently observed that an individual's interest in nondisclosure of his home address is "not insubstantial," "nontrivial," and "far from insignificant." *Defense* v. *FLRA*, 510 U.S. at 500-501. Other courts of appeals have characterized that privacy interest as "significant,"

NARFE, 879 F.2d at 875, "important," *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992), and "strong," *American Federation of Government Employees* v. *United States Dep't of Health and Human Services*, 712 F.2d 931, 932 (4th Cir. 1983). The Ninth Circuit's ruling that the privacy interest in nondisclosure of names and home addresses is of minimal weight conflicts with those decisions and greatly undervalues the substantial privacy interests at stake for every person who receives information from the federal government. According to the Ninth Circuit, such individuals have opened their homes to all public interest groups, commercial enterprises, catalogue publishers, and telemarketing firms who are eager to add the names, home addresses, and personal interests of individuals to their computer databases. The ruling below thereby significantly weakens the FOIA's protections for personal privacy.

If left unreviewed, the Ninth Circuit's ruling may have a serious, widespread impact, for it is contrary to the general practice of numerous federal agencies that maintain lists similar to those ordered released in this case. Government agencies will be placed in the position of having to apply different standards to FOIA requests depending on the jurisdiction in which the requester resides or the requested documents are located. And whether a person's privacy interests are protected ultimately will vary in the same way. Review by this Court therefore is warranted.

1. The court of appeals' ruling cannot be reconciled with settled precedents of this Court regarding the FOIA and Exemption 6. The Court recently and unequivocally reaffirmed, as one of the "basic principles" that has informed the Court's interpretation of the FOIA, that the *only* public interest to be weighed, when deciding the applicability of FOIA Exemption 6, "is the extent to which

disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government.*'" *Defense* v. *FLRA*, 510 U.S. at 495, quoting *Reporters Committee*, 489 U.S. at 775 (emphasis added by Court in *Defense* v. *FLRA*). The public interest to be weighed is the extent to which disclosure serves that purpose—whether disclosure of the requested information "sheds light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773.[7] Other reasons for disclosure that might be deemed to further a "public interest" in other contexts are not relevant under Exemption 6. *Defense* v. *FLRA*, 510 U.S. at 498-499 (holding that the public interest in effective collective bargaining, expressed in a federal labor statute, did not constitute a public interest that could be weighed in the balance under FOIA Exemption 6); *Reporters Committee*, 489 U.S. at 775 (finding that there would be "*some* public interest in providing interested citizens with answers to their questions" about certain individuals suspected of having criminal records, but holding that "that interest falls outside the ambit of the public interest that the FOIA was enacted to serve"). The Court has expressly held that the public interest underlying the FOIA "is not fostered by disclosure of information about private citizens that is

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[7] *Reporters Committee* involved FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which applies to records compiled for law enforcement purposes. Application of that exemption involves a determination similar to that under Exemption 6: whether disclosure would constitute an unwarranted invasion of personal privacy. Although the two exemptions "differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions," this Court has recognized that "the *identification* of the relevant public interest to be weighed in the balance" is the same under both exemptions. *Defense* v. *FLRA*, 510 U.S. at 497 n.6.

accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Defense* v. *FLRA*, 510 U.S. at 496, quoting *Reporters Committee*, 489 U.S. at 773.

Another basic principle recently reaffirmed by the Court is that whether disclosure is required under Exemption 6 "cannot turn on the purposes for which the request for the information is made." *Defense* v. *FLRA*, 510 U.S. at 496, quoting *Reporters Committee*, 489 U.S. at 771. To the contrary, "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" *Ibid.*, quoting *Reporters Committee*, 489 U.S. at 771, and *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); see also *Reporters Committee*, 489 U.S. at 771 (noting that, except in certain cases involving privilege claims, "the identity of the requesting party has no bearing on the merits of his or her FOIA request"). "[B]ecause all FOIA requesters have an equal, and equally qualified, right to information," the fact that a particular requester seeks to vindicate a certain public policy is "irrelevant to the FOIA analysis." *Defense* v. *FLRA*, 510 U.S. at 499 (holding that union's interest in vindicating policies underlying labor statute were irrelevant to FOIA Exemption 6 determination); *Reporters Committee*, 489 U.S. at 771 (holding that the rights of the press are no different from "those that might be asserted by any other third party, such as a neighbor or prospective employer"). Whether disclosure of a document under the FOIA is warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny,"' rather than on the particular purpose for which the document is being requested." *Id.* at 772

(citation omitted), quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 372 (1976).

The Ninth Circuit disregarded the clear holdings of *Defense* v. *FLRA* and *Reporters Committee* and weighed, as part of the asserted public interest in disclosure, respondent's announced purpose of providing additional information to the persons who were included on the *BLM News* mailing list. The court of appeals thereby improperly broadened the relevant public interest under Exemption 6 and improperly considered the FOIA requester's identity and purpose.

In the early part of its opinion, the court of appeals purported to acknowledge the limited nature of the public interest that can be considered under the FOIA. The court noted the government's contention that it could no longer consider the FOIA requester's interest, as it had under its four-factor test set forth in *FLRA* v. *United States Dep't of Navy*, 958 F.2d 1490, 1494-1496 (1992) (*FLRA* v. *Navy*) (subsequently withdrawn, 22 F.3d 898 (1994)), and it appeared to agree that that change was mandated by this Court's intervening decision in *Defense* v. *FLRA*. Thus, the court observed that, in *Defense* v. *FLRA*, the Court "disagreed with the decisions *in this Circuit* and in the Fifth Circuit that had considered the union's particular interest," App., *infra*, 5a (emphasis added), citing *FLRA* v. *Navy*, *supra*; *FLRA* v. *United States Dep't of Defense*, 975 F.2d 1105 (5th Cir. 1992) (subsequently reversed, 510 U.S. 487 (1994)), and it pointed out that the district court's consideration of respondent's interest as a relevant factor had occurred before this Court decided *Defense* v. *FLRA*. See App., *infra*, 5a-6a.

Nonetheless, in the next part of its opinion, where it analyzed the public interest at stake in the instant case, the court of appeals proceeded to consider, as part of the public interest, respondent's interest in providing persons

on the *BLM News* mailing list with additional information. There, the court expressly agreed with respondent's argument that there is a "substantial public interest in knowing to whom the government is directing information * * * so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light." App., *infra*, 6a. The fact that respondent intended to provide people on the mailing list with additional information is irrelevant to the determination whether FOIA Exemption 6 protects the mailing list from disclosure. Although providing individuals with additional information from respondent may serve the "public interest" in some general sense, it does not serve the public interest relevant to FOIA Exemption 6 because it does not reflect the *agency's* conduct or activities.[8]

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[8] Whether provision of additional information to newsletter recipients serves the "public interest" in any sense depends, of course, on what one views to be the public interest and what the additional information includes. Some may believe that providing additional information from a different perspective about the land and government projects discussed in the *BLM News* would serve the general public interest. But that is not the public interest at stake in FOIA Exemption 6 determinations, because it does not reflect the agency's conduct or activities, only the views of another entity on the matter. The FOIA was not intended to provide private persons with information about what other private persons think the government is doing. Moreover, even that purpose would not be directly served by disclosure of the list. It is only as a result of further action by the FOIA requester that such a public interest could be served; the requester would have to make use of the mailing list to provide additional information to those listed. Yet, the FOIA's interest in disclosure is not aimed at such derivative uses. Cf. *United States Dep't of State* v. *Ray*, 502 U.S. 164, 178-179 (1991) (noting the argument that derivative use of requested documents is beyond the purposes of the FOIA, but declining to resolve that issue). In any event, if the mailing list were made publicly available under the FOIA, any additional information sent to the newsletter recipients could consist of purely fundraising information or commercial materials (from respondent or others) and have absolutely nothing to say even about respondent's views of the government's conduct or activities.

The most obvious flaw in the Ninth Circuit's analysis is that its application would yield a different result under FOIA Exemption 6 in a case involving a different FOIA requester or a different purpose motivating the request. For example, if a retailer of outdoor clothing had requested the *BLM News* mailing list with the intent to use it to distribute advertising or a mail-order catalogue, the court of appeals' view of the public interest at stake would have been significantly altered. The public interest that would be served, in the court's view, by providing those on the mailing list with more information from respondent about its view of the government's activities would not be present.

By including the interest and intentions of the FOIA requester as part of the public interest to be weighed under Exemption 6, the Ninth Circuit, in essence, reverted to its four-factor test under *FLRA* v. *Navy*, which included the plaintiff's interest as one of the factors to be weighed. But that factor was precisely what this Court rejected in *Defense* v. *FLRA*, as the court of appeals itself elsewhere acknowledged. See App., *infra*, 5a. Indeed, the Ninth Circuit granted rehearing and withdrew its opinion in *FLRA* v. *Navy* in light of this Court's ruling in *Defense* v. *FLRA*. See 22 F.3d 898, 899 (1994).

The court of appeals' erroneous consideration of respondent's interest and intent to disseminate information to the persons on the *BLM News* mailing list clearly affected the balancing of interests in this case and the ultimate conclusion that the mailing list must be disclosed. The fact of respondent's interest in providing additional information to the persons on the mailing list is what per-

suaded the court to "conclude that there is more than a minimal public interest served by disclosure in this case." App., *infra*, 6a. And when the court of appeals ultimately weighed the public interest against the privacy interest, it made clear that the public interest it considered significant enough to outweigh the privacy interest was not the "interest in knowing with whom the government has chosen to communicate," but also the interest "*in providing those persons with additional information.*" *Id.* at 8a (emphasis added).

Absent consideration of respondent's interest, there could be no significant public interest to outweigh the privacy interest in nondisclosure (see pages 20-27, *infra*).[9] The only other public interest that the court identified was the general presumption of disclosure underlying the FOIA, but that presumption is not an independent factor that is weighed in the balance when making a FOIA Exemption 6 determination. App., *infra*, 5a.[10] Moreover, even the court of appeals appeared to recognize that that presumption was not sufficient to require disclosure absent the other "public interest" it invoked, *i.e.*, respondent's announced purposes. Put simply, the *BLM News* mailing list, by itself, "tell[s] us nothing directly about" the conduct of government. *Reporters Committee*, 489 U.S. at 774. As Judge Fernandez observed: "One thing

[9] Indeed, the district court concluded that, even when openly weighing respondent's interest on the public interest side of the balance, the public interest barely tipped the scales. App., *infra*, 20a; see note 5, *supra*.

[10] The general presumption of disclosure under the FOIA does not arise out of a factual determination that the public interest is served, to some extent, by disclosure in all cases. Rather, the presumption arises from the FOIA provision that expressly places on the government agency the burden of sustaining its decision to withhold requested documents. 5 U.S.C. 552(a)(4)(B).

is certain. The information that a mailing list will give the public about what the government is up to is minuscule or nil, most likely the latter." App., *infra*, 9a.[11]

The minuscule public interest in disclosure of the *BLM News* mailing list is comparable to the lack of public interest in disclosure in the home address list at issue in *Defense* v. *FLRA*. There, the Court found that the public interest in disclosure of documents containing home addresses of federal employees was negligible because it would not bear on the government agencies or their activities. 510 U.S. at 495.

The Court should grant review not only to correct the Ninth Circuit's departure from *Defense* v. *FLRA*, and *Reporters Committee*, but also to resolve a conflict in the circuits on the nature of the "public interest" at issue here. In *NARFE* v. *Horner*, *supra*, the D.C. Circuit refused to consider, as relevant to its FOIA Exemption 6 determination, the fact that disclosure of the names and addresses of federal annuitants would aid the FOIA requester in its lobbying efforts. See 879 F.2d at 879. The *NARFE* court stated that, "[u]nder *Reporters Committee*, these considerations are not relevant; they involve not 'what the[] Government is up to,' but only what it might be up to if NARFE had its druthers." *Ibid.* Likewise, in *Reed* v. *NLRB*, 927 F.2d 1249 (D.C. Cir. 1991), cert. denied, 502 U.S. 1047 (1992), the D.C. Circuit refused to give any "public interest" consideration to the the plaintiff's desire to obtain the names and home addresses of employees eligible to vote in union representation elections in order "to correct allegedly widespread misrepresentations the

[11] Disclosure of the *BLM News* itself serves the public interest underlying the FOIA by disclosing "what the[] government is up to." *Reporters Committee*, 489 U.S. at 773. Petitioner has never objected to its disclosure, and respondent is free to receive it upon request.

Board has made to employees" concerning union matters. *Id.* at 1252. Thus, contrary to the Ninth Circuit's ruling below, the D.C. Circuit has recognized that facilitating the lobbying activities of private groups does not serve the "core purpose of the FOIA." See *Reporters Committee*, 489 U.S. at 775.

2. The decision of the court of appeals also conflicts with rulings by this Court and by other courts of appeals regarding the privacy interest supporting the withholding of home addresses under FOIA Exemption 6. In *Defense* v. *FLRA*, the Court considered whether FOIA Exemption 6 protects from disclosure the home addresses of federal employees. The Court concluded that an employee's privacy interest in nondisclosure of his or her home address is "not insubstantial," observing that, although such information is publicly available through a source such as a telephone directory, "[t]he privacy interest protected by Exemption 6 'encompass[es] the individual's control of information concerning his or her person.'" 510 U.S. at 500, quoting *Reporters Committee*, 489 U.S. at 763. Specifically, the Court held that employees who had not revealed their addresses to union representatives had a "nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." *Id.* at 501.

The Court emphasized that, even if the only result of disclosure were mailings, an individual's privacy interests in preventing such mailings was not lessened. 510 U.S. at 501. The Court was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Ibid.*, citing *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970), and *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Moreover, the Court found it

clear that the individual privacy interest "is *far from insignificant*" when one considers that commercial advertisers and solicitors must have the same access under the FOIA as the requester. *Ibid.* (emphasis added).[12] Various courts of appeals have also recognized the importance of the privacy right in nondisclosure of a person's home address, describing it as "significant," *NARFE*, 879 F.2d at 875, "important," *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992), and "strong," *American Federation of Government Employees* v. *United States Dep't of Health and Human Services*, 712 F.2d 931, 932 (4th Cir. 1983).[13]

In its earlier opinion in *Reporters Committee* addressing the privacy interests relevant to FOIA Exemption 7(C) (see note 7, *supra*), the Court explained that the "privacy interest" underlying the FOIA "encompass[es] the individual's control of information concerning his or her person." 489 U.S. at 763. The Court emphasized that "[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others," *id.* at 764 n.16 (citation omitted), and it reaffirmed "the privacy interest

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[12] Cf. *United States Dep't of State* v. *Ray*, 502 U.S. at 176 n.12 ("whether disclosure of a list of names is a 'significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue'"), quoting *NARFE*, 879 F.2d at 877.

[13] This Court noted in *Defense* v. *FLRA* that, although the courts of appeals "have differed in their characterization of the magnitude of the interest implicated," they recognize the presence of "some privacy interest" in home addresses. 510 U.S. at 501 n.8 (citing cases). By contrast, in describing the privacy interest at stake here as "minimal," App., *infra*, 15a, the district court relied upon the Ninth Circuit's now-withdrawn opinion in *FLRA* v. *Navy* that "the interest in keeping one's home address from the union bargaining on one's behalf is minimal." 958 F.2d at 1496.

in keeping personal facts away from the public eye." *Id.* at 769.

Reporters Committee also relied on "[o]ther portions of the FOIA itself [that] bolster the conclusion that disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." 489 U.S. at 765. The Court pointed to Section 552(a)(2), which provides:

> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction.

5 U.S.C. 552(a)(2); see *Reporters Committee*, 489 U.S. at 765; *id.* at 755 n.7 (noting similarity of language to that employed in Section 552(b)(6)). The Court similarly relied on Section 552(b), in which the FOIA "assures that '[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record *after deletion of the portions which are exempt* under [§ (b)].'" 489 U.S. at 765, quoting 5 U.S.C. 552(b). The Court concluded that "[t]hese provisions, for deletion of identifying references and disclosure of segregable portions of records with exempt information deleted, reflect a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant pri-

vacy interests." 489 U.S. at 766.[14] The *Reporters Committee* Court then declared:

> [T]he FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

Id. at 774-775.[15]

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[14] The Court noted some examples that had been discussed in the Senate and House Reports accompanying the 1966 enactment of the FOIA. See Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250. The Court explained that "it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public." 489 U.S. at 766 n.18, quoting S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965). It also observed that "[t]he public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." *Ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 8 (1966). The Court concluded that "the identity of the individuals given public relief or involved in tax matters is irrelevant to the public's understanding of the Government's operation." *Ibid.* Similarly, it concluded that the identity of the subject of rap sheets was "irrelevant to the public's understanding of the system of law enforcement" because they reveal "only * * * personal history of individuals" and "tell us nothing about matters of substantive law enforcement policy that are properly the subject of public concern." *Ibid.*

[15] The "potential effect of the Court of Appeals' opinion on values of personal privacy" is what led the Court to grant review in *Reporters Committee*. 489 U.S. at 762.

The Ninth Circuit's minimalist view of the privacy interest in names and home addresses does not comport with the foregoing precedents. Indeed it echoes the "cramped notion of personal privacy" rejected by the Court in *Reporters Committee*. See 489 U.S. at 763.

As the Eleventh Circuit has observed, "an address tells much more than just where a person lives." *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 549. For example, disclosure of a home address would reveal information concerning the type of neighborhood in which the individual lives and the lifestyle and socioeconomic status of that individual. *Ibid.* Disclosure of a list of names and addresses also would invariably convey additional information about the persons listed because of the "defining characteristics" of the list. *NARFE*, 879 F.2d at 876 (list indicated that those on it were retired or disabled and received a monthly annuity check from the government). Disclosure of the *BLM News* mailing list would reveal, *inter alia*, private citizens' "personal interests" in BLM activities. As Judge Fernandez observed: "It takes no sophisticate to perceive that the list will at least tell others that these are people who are interested in what happens to land that is controlled by the policies and doings of the BLM." App., *infra*, 9a. Judge Fernandez further pointed out the obvious: "If all somebody wanted were a bunch of names and addresses that conveyed no information about the individuals on the list, that person could do a random selection from the telephone book." *Ibid.*

Moreover, in assessing the privacy interest at stake, the court of appeals dismissed the real implication of disclosure of home addresses. Under *Defense* v. *FLRA*, it is clear that, in assessing the extent of a privacy invasion, a court must consider the ramifications of disclosure not just to the requester at hand, but to the general public,

including to "other parties, such as commercial advertisers and solicitors." 510 U.S. at 501. That is because, as discussed above, the rule is that all other persons "must have the same access under FOIA" as the particular requester before the court. *Ibid.*; *Reporters Committee*, 489 U.S. at 771; see *Painting & Drywall Work Preservation Fund, Inc.* v. *Department of Hous. & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (if the information "must be released to one requester, it must be released to all, regardless of the uses to which it might be put"); cf. *Swan* v. *SEC*, 96 F.3d 498, 499-500 (D.C. Cir. 1996) (under FOIA, "[r]ecords, if not exempt, must be made 'promptly available to any person,'" 5 U.S.C. 552(a)(3); in light of the thousands of FOIA requests received by federal agencies each year, "[i]t would be an administrative nightmare if disclosure turned on who was making the request," and "agencies may not know who ultimately will receive the information").[16] Furthermore, in this particular case, respondent announced that it "intends to make the mailing list available to other public interest groups who share similar goals." See C.A. E.R. 10.

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[16] In limiting its view of the privacy interests at stake if FOIA Exemption 6 does not apply, the court of appeals again improperly relied on the identity of the FOIA requester and its stated purposes. The court distinguished *Defense* v. *FLRA* on the ground that the FOIA requester, a labor union, likely intended to use the addresses to target people at home for "aggressive, high stakes personal contact." See App., *infra*, 7a. The court of appeals concluded that the *BLM News* recipients, however, had indicated an interest in "receiving mailings on subjects related to [respondent's] interest in this case," and were unlikely to be targets of "aggressive, high stakes personal contact" upon disclosure. *Ibid.* That conclusion ignores the fact that the names and addresses would be disclosable to all other members of the public, and there is no support for the court's conclusion that disclosure would not lead to intrusive personal contacts.

Just as the availability of name and address lists for recent federal retirees would inevitably encourage solicitations, *NARFE*, 879 F.2d at 878, so, too, would the availability of lists of private citizens on specialized government mailing lists. In both cases, "one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly." See *ibid.* The possibility that some individuals might welcome some intrusions does not detract from the likelihood that others "would be irritated rather than enlightened" by them. *Minnis* v. *United States Dep't of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

The fact that some of the persons on the *BLM News* mailing list asked to be put on the list does not lessen their privacy interest in keeping out other mail, as the court of appeals suggested. App., *infra*, 6a. Merely because individuals have expressed an interest in receiving specific information from the BLM does not mean that they intend to open their mailboxes to *all* materials about the BLM or its activities from the various organizations that might produce BLM-related matter, much less from commercial advertisers. Providing the government with information regarding his or her home address "does not mean that an individual has no interest in *limiting* disclosure or dissemination of the information." *Reporters Committee*, 489 U.S. at 770 (citation omitted; emphasis added).

The Ninth Circuit's decision is particularly disturbing in an age in which significant invasions of privacy can begin with a simple name and home address. As noted above, other courts of appeals have recognized that "an address tells much more than just where a person lives." *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 549; see *NARFE*, 879 F.2d at 876. Sophisticated computer marketing campaigns begin with a name and address, which are then compiled, subjected to demographic analysis, and distributed to others. Under the Ninth Circuit's holding, names and home addresses innocuously retained in government files could find their way over the Internet to the World Wide Web, where directories of "people finders" offer personal information to commercial enterprises, private investigators, estranged spouses—in fact, to anyone in the world with a modem and an interest, whether it be legitimate or not. Therefore, if left unreviewed, the decision below could have profound implications for personal privacy in the information age. Cf. *Reporters Committee*, 489 U.S. at 770-771.

3. The Ninth Circuit's ruling implicates myriad lists maintained by numerous federal agencies, including, *inter alia*, the Department of State (which maintains a mailing list of 1500 individuals who have asked to receive the Secretary's speeches), the Department of Housing and Urban Development (which maintains a list of individuals interested in urban planning and other housing-related topics), the National Labor Relations Board (which maintains lists of home addresses of individuals eligible to vote in representation elections), and the Social Security Administration (which maintains lists of individuals interested in receiving its various publications, including the *Social Security Courier*, a newsletter regarding matters of interest to Social Security recipients). The ruling below threatens the general approach of the federal government that individual names and home addresses are exempt from disclosure. Federal agencies will be placed in the untenable position of having to apply dual standards to the sensitive issue of personal privacy, depending upon the jurisdiction in which a FOIA request arises. And whether a person's privacy interests are protected under FOIA Exemption 6 ultimately will vary accordingly.

The Ninth Circuit's application of Exemption 6 threatens the disclosure of the home addresses of thousands of private individuals merely because they receive information from the federal government. Under the Ninth Circuit's standard, those individuals would become fair game for mailings from the whole of society, from public interest groups to mail-order merchants, regardless of whether their home addresses would "shed[] light on an agency's performance of its statutory duties." *Reporters Committee*, 489 U.S. at 773. The FOIA was not intended to require that an individual surrender such individual privacy in order to obtain information about government activities and conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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NOVEMBER 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35150

D.C. No. Cv-93-00895-MFM

OREGON NATURAL DESERT ASSOCIATION,
PLAINTIFF-APPELLEE

v.

D. DEAN BIBLES, OREGON STATE DIRECTOR,
BUREAU OF LAND MANAGEMENT,
DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

[DECIDED: MAY 20, 1996]

Before: MARY M. SCHROEDER, STEPHEN REINHARDT, and FERDINARD F. FERNANDEZ, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

This is a Freedom of Information Act suit brought by an Oregon non-profit association, interested in

desert preservation, against the Oregon Director of the Bureau of Land Management ("BLM"). The suit requests the names and addresses of persons who receive the BLM's newsletter. The newsletter provides information about the BLM's activities and plans affecting the Oregon desert. Plaintiff, the Oregon Natural Dessert [*sic*] Association ("ONDA"), according to its complaint, made its Freedom of Information Act ("FOIA") request to learn to whom the government was directing "selected" information about the high desert, so that ONDA could provide those persons with more complete information.

The BLM originally refused to release any portion of the list, invoking exemption 6 of the Freedom of Information Act, which protects files whose disclosure would constitute "a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(6)(C)(b)(6)[*sic*]. The ONDA appealed that decision to the Department of the Interior. The Department of the Interior concluded that the names and addresses of organizations should be released, but that the names and addresses of private individuals were protected by exemption 6. The ONDA then filed the action in the District Court for the District of Oregon, to obtain the complete list.

The district court agreed with ONDA that disclosure of the list would not constitute a clearly unwarranted invasion into the privacy of individuals who "have already opened their mail boxes to the receipt of information about BLM activities." The district court ordered the BLM to release all the names and addresses, but stayed its order pending the BLM's appeal to this court. We now affirm.

The FOIA mandates broad disclosure of government documents:

> [E]ach agency, upon any request for records which (A) reasonably describes such record and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3). The FOIA request must be granted unless the information requested falls within one of the nine statutory exemptions set forth in 5 U.S.C. § 552(b). The government has the burden of establishing that an exemption applies, and exemptions are construed narrowly. *See, e.g., Dept. of Air Force v. Rose*, 425 U.S. 352, 361-62 (1976); *Multnomah County Medical Soc. v. Scott*, 825 F.2d 1410, 1413 (9th Cir. 1987).

The FOIA's privacy exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Although a list of names and addresses like the one at issue in this case is clearly not a "medical" or "personnel" file, the provision for "similar" files is broad enough to encompass government records containing information about particular individuals. *See United States Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 n.4 (1982). We have recognized that a government list of names and addresses meets the threshold requirement of exemption 6. *See, e.g., Minnis v. United States Dept. of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Van Bourg, Allen, Weinberg & Roger For and on Behalf of Carpet, Linoleum and Soft Tile*

Workers Union, Local 1288 v. N.L.R.B., 728 F.2d 1270 (9th Cir. 1984).

The relevant question is thus whether the disclosure of this mailing list would constitute a "clearly unwarranted invasion of personal privacy." We know from an early Supreme Court decision under FOIA that resolving this question involves balancing the individual's right of privacy against the goal of FOIA to "open agency action to the light of public scrutiny." *Air Force v. Rose*, 425 U.S. at 372.

This Circuit historically has considered four factors in this balancing: (1) the plaintiff's interest in dislosure; (2) the public's interest in disclosure; (3) the degree of invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information. *F.L.R.A. v. United States Dept. of Navy, Navy Resale & Services Support Office, Field Support Office, Auburn, Washington*, 958 F.2d 1490, 1494 (9th Cir. 1992), *withdrawn on rehearing*, *F.L.R.A. v. United States Dept. of Navy*, 22 F.3d 898, (9th Cir. 1994); *Minnis*, 737 F.2d at 786. The district court in this case considered all of the factors. The parties do not dispute that outside of ONDA's FOIA request, there are no alternative means to obtain the requested information. Additionally, the parties agree that the district court was required to consider the second and third factors; that is, the public's interest in disclosure and the degree of invasion of personal privacy.

The BLM points out, however, that under recent Supreme Court cases, we should no longer consider the first factor, i.e. the plaintiff's particular interest in the requested information, as militating for or against disclosure. This change is mandated by the Supreme Court's intervening decision in *United*

States Dept. of Defense v. F.L.R.A., 114 S.Ct. 1006 (1994). *See generally Schiffer v. F.B.I.*, 1996 WL 996735, 4 (9th Cir.) (plaintiff's particular interest may not be considered in analyzing exemption 7(C), a provision similar to exemption 6 that applies if the disclosure of law enforcement files would constitute an unwarranted invasion of privacy). In *DOD*, the Court denied a union's FOIA request for a list of government employees in the union's own bargaining unit, even though the union requested the list to further federal labor policies as embodied in the federal labor statutes. In ruling that the list of government employees was protected by exemption 6, the Supreme Court held that the only relevant interest in disclosure is the public's interest in understanding government operations or activities. *Id.* at 1012. The Court's analysis focused upon the language of its earlier decision in *United States Dept. of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), where the Court explained that FOIA's "basic policy . . . indeed focuses on the citizen's right to be informed about what their government is up to." Eliminating the plaintiff's particular interest from the exemption 6 equation, the Supreme Court in *DOD* disagreed with the decisions in this Circuit and in the Fifth Circuit that had considered the union's particular interest and had granted the union's FOIA request. *See F.L.R.A. v. Department of Navy*, 958 F.2d 1490; *F.L.R.A. v. Department of Defense*, 975 F.2d 1105 (5th Cir. 1992).

In this case, the district court issued its decision before the Supreme Court's decision in *DOD*, and it therefore considered ONDA's individualized interest in the disclosure of the BLM news mailing list, in

addition to the general public interest in knowing "what their government is up to." Although the BLM contends that the district court's consideration of ONDA's particular interest requires us to reverse, the district court did not find that ONDA's interest in disclosure was material. Rather, the district court concluded that there was no interest furthered by disclosure beyond the general public interest in knowing what the government is doing, as embodied in "FOIA's general presumption against withholding information." The district court's consideration of the plaintiff's interest does not require reversal because it did not affect the district court's decision in this case.

ONDA argues persuasively on appeal that in addition to the overarching presumption favoring disclosure, which was relied upon by the district court, there is also a substantial public interest in knowing to whom the government is directing information, or as ONDA characterizes it, "propaganda," so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light. We agree and therefore conclude that there is more than a minimal public interest served by disclosure in this case.

We next must consider whether this public interest in disclosure is outweighed by the invasion of privacy that would result from disclosure of the list. The BLM has argued that dissemination of its mailing list would cause the persons listed to be flooded with unsolicited mail. Yet the district court aptly observed that these individuals are already on a mailing list, on which the majority of the individuals asked to be placed, in order to receive mailings about

BLM activities. As the district court concluded, the privacy interests implicated in the case are minimal in light of the mailings already received by the individuals and the similar subject matter of the mailings likely to be received as a result of the disclosure.

The Supreme Court's decision in *DOD* fully supports the district court's analysis, which measures the privacy interest at stake in terms of the nature and likelihood of probable contacts stemming from the particular disclosure. *DOD* further supports the district court's conclusion that in this case the invasion of privacy would be minimal. The Supreme Court in *DOD* looked to the practical effect of the disclosure, considering the types of mailings and other contacts or solicitations that the listed employees were likely to receive if their names and addresses were disseminated. The Court said that the *DOD* employees had a "nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps union related telephone calls or visits that would follow from disclosure." 114 S.Ct. at 1015. The employees in that case had chosen not to provide the union with their addresses. In this case, the persons on the BLM's mailing list have, for the most part, affirmatively indicated their interest in receiving mailings on subjects related to ONDA's interest in this case. Furthermore, recipients of the BLM news are unlikely to be targeted for the same type of aggressive, high stakes personal contact that the Court was wary of in *DOD*. In short, the effect of disclosure is much smaller than in *DOD*.

For similar reasons, we disagree with the BLM's position that our decision in *Minnis* militates in favor of the BLM's position in this case. In *Minnis*, we held that disclosure of a list of persons who had

applied for government permission to river raft would have resulted in unwarranted invasion of their privacy. 737 F.2d at 787-88. In that case, the public interest in disclosure was less than in this case, for the individuals applying to use the river were not persons whom the government had targeted to receive information about government operations. Further, the privacy interests were greater, for the individuals were not already on a mailing list and would likely, as a result of disclosure, become the targets of unwarranted commercial solicitation. Our concerns about privacy interests in *Minnis* were not dissimilar from those expressed by the Supreme Court in *DOD* about unsolicited contacts from unwelcome sources.

Because the privacy interests at stake are minimal, and because there is a significant public interest in knowing with whom the government has chosen to communicate and in providing those persons with additional information, we conclude that disclosure of the mailing list would not result in a clearly unwarranted invasion of privacy. The decision of the district court is AFFIRMED.

FERNANDEZ, J., dissenting:

Once again we are asked to bridle at and practically ignore the FOIA teachings of the United States Supreme Court. *See United States Dep't of Defense v. FLRA*, ___ U.S. ___, 114 S. Ct. 1006, 1012, 127 L. Ed. 2d 325 (1994); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771-73, 109 S. Ct. 1468, 1481, 103 L. Ed. 2d 774 (1989). Once again we are asked to allow curiosity and gain to trump privacy. We should decline the invitations.

One thing is certain. The information that a mailing list will give the public about what the government is up to is minuscule or nil, most likely the latter. That the BLM is sending out mailers is a fact well known, and if any person wishes to know what is in the mailers he need only ask for them. However, it tells us nothing about government when we discover that the mailer went to John Doe in New York or Billy Rowe in Los Angeles. ONDA does not really want to check on the government; it wants to contact the people on the list.

Another certainty is that a list does convey more information about the recipient than a mere name and address. The proof of the pudding is in the eating, and ONDA desires this pudding so that it can feed upon information about the people who have allowed their names to be put on the list. It takes no sophisticate to perceive that the list will at least tell others that these are people who are interested in what happens to land that is controlled by the policies and doings of the BLM. If all somebody wanted were a bunch of names and addresses that conveyed no information about the individuals on the list, that person could do a random selection from the telephone book. Just as a list of people who seek to travel on a river conveys information about them, the list in question conveys information about the people on it. *See Minnis v. United States Dep't of Agric.*, 737 F.2d 784, 787 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S. Ct. 2112, 85 L. Ed. 2d 477 (1985). And just as a list of employees conveys information about them, so too does this list convey information. As I have pointed out before, the weight to be given to the privacy interest of individuals, who are on a list, seems to vary from judge to judge, but I continue to believe that "everyone agrees

that it has some weight." *FLRA v. United States Dep't of Navy*, 958 F.2d 1490, 1498 (9th Cir. 1992) (Fernandez, J., dissenting), *withdrawn*, 22 F.3d 899 (1994). Certainly the weight it has outweighs the nonexistent weight of the interest in public disclosure.

Nor, of course, does the claimed purity of ONDA's motives make a bit of difference. If ONDA can get the list, anyone can. Perhaps ONDA simply wants to send what it deems to be "correcting" information to those who receive BLM information. Perhaps it would also like to do some fund-raising. Perhaps it wishes to enlist others into its efforts to save the land. Other people may want to use the list for other purposes which are either more or less edifying. None of that makes any difference because if ONDA is "entitled to break the seal of privacy and throw open the doors of this adytum, the doors will be opened to everyone." *Id.* Whether the requester's desires are driven by "news, need, or nebbiness," the information will be made available to him. *Id.* Opening the list to the world is an improper invasion of privacy for which there is no public need and no excuse.

Thus, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CIVIL NO. 93-895-MA

OREGON NATURAL DESERT ASSOCIATION, PLAINTIFF

v.

D. DEAN BIBLES, OREGON STATE DIRECTOR,
BUREAU OF LAND MANAGEMENT, DEFENDANT

[FILED: NOV. 18, 1993]

OPINION

MARSH, Judge.

Plaintiff is a non-profit public interest group which filed this action seeking to compel the Bureau of Land Management to disclose its mailing list for the *BLM News* pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Both parties have filed cross-motions for summary judgment and both agree that no genuine issue of material fact exists and that summary judgment is appropriate.

BACKGROUND

On August 13, 1992, plaintiff requested the *BLM News* mailing list along with a request for separate mailing lists used by the BLM for the Western Ore-

gon District Regional Management Plans (RMPs). On November 3, 1992, the Oregon State Office of the BLM provided all six Western Oregon RMP mailing lists, but denied the request for the *BLM* News mailing list, citing FOIA Exemption 6, 5 U.S.C. 552(6)(C)(b)(6)[*sic*]. D. Dean Bibles, Oregon State Director for the BLM, explained that "[t]here is a difference in the gathering and use of the RMP and BLM News mailing lists."[1] According to Bibles, Federal RMP regulations provide that lists of interested individuals "shall be maintained" as part of the public record, whereas, the *BLM News* mailing list "has never been released to the public." The *BLM News* mailing list is compiled by the BLM and is comprised of individuals who have asked to be placed on the list, and those who "appear to show an interest in BLM activities."

Plaintiff appealed the denial of access to the *BLM News* mailing list to the Department of the Interior. On February 25, 1993, the Interior Department concluded that FOIA Exemption 6 protected the names and addresses of private individuals on the list, but that addresses should be released for organizations, business entities and individuals listed in their capacity as representatives or officials. On March 19, 1993, the BLM advised plaintiff that there were a total of 4,500 names and addresses on the *BLM News* mailing list and that, after reviewing and editing the data

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[1] According to the affidavit of Leslie Robinette, Public Affairs Specialist for the BLM, the mailing lists for the *BLM News* and the RMPs are actually gathered in the same manner—by request in most instances and automatically by the BLM where the agency assumes the party has an interest in the activity.

base, they could produce the redacted list pursuant to the Interior Department's directive by August 13, 1993.

Plaintiff did not respond to the letter, and neither party has indicated whether the August deadline was met or whether plaintiff has received the readacted list, and if so, how many names and addresses remain withheld pursuant to exemption 6. Plaintiff filed this action on July 23, 1993 seeking release of the entire *BLM News* mailing list.

DISCUSSION

The FOIA is actually a 1966 amendment to the Administrative Procedure Act addressing publication of government records. *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 755 (1989) ("*Reporters*"). Congress decided that the former provision fell "far short" of disclosure goals and structured the FOIA revision to reflect a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). This list of nine exemptions from disclosure is exclusive, *Id. citing* 5 U.S.C. 552(c), and all exemptions "must be narrowly construed." *Id.* The burden of persuasion is on the government agency to justify non-disclosure. *Reporters*, 489 U.S. at 756, *citing* 5 U.S.C. 552(a)(4)(B).

Both parties agree that exemption 6 is the only exemption pertinent to this action. Exemption 6 permits withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has defined "similar file" broadly to include any government record which

contains information about an individual. *United States Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The Ninth Circuit has held that lists of names and addresses meet the definition of such a "similar file." *Minnis v. United States Dept. of Agriculture*, 737 F.2d 784 (9th Cir. 1984). Thus, the relevant inquiry is whether disclosure constitutes a "clearly unwarranted invasion of personal privacy." *See e.g. FLRA v. U.S. Dept. of Defense*, 984 F.2d 370, 374 (10th Cir. 1993).

The Court has recognized that exemption 6 "requires a court to exercise a large measure of discretion." *Rose*, 425 U.S. at 379, n.17. This discretion should be exercised by balancing "the individual's right of privacy against the preservation of the basic purpose of the [FOIA] to open agency action to the light of public scrutiny." *Id.*, at 373.

Many of the cases which address exemption 6 involve requests for files with information regarding specific individuals. *See e.g. Rose*, 425 U.S. 352 (law students may have access to redacted files of Air Force Cadet ethics hearings); and *United States Dept. of State v. Washington Post Co.*, 456 U.S, 598 (1982) (exemption 6 may apply to request for citizenship information; remanded for application of balancing test to determine if disclosure would constitute an unwarranted invasion of privacy). In both instances, the Court found that an *in camera* review of the materials sought was necessary to enable the district court to consider the privacy interests sought to be protected.

In contrast, neither party in this case has sought or suggested an *in camera* review of the *BLM News* mailing list. Although the government argues that the addresses of certain individuals on the list may

implicitly reveal certain geographic and socio-economic information about those individuals, this is clearly not a case in which the documents sought would reveal particularly personal or potentially embarrassing information. Although the Circuits have varied widely in the degree of significance ascribed to one's privacy interest in being included on a government mailing list, the Ninth Circuit has rejected such attempts and described the privacy interest as "minimal." *FLRA v. U.S. Dept. of Navy*, 958 F.2d 1490, 1496 (9th Cir. 1992) (citations omitted).

In the Ninth Circuit's decision in *FLRA*, the court rejected an agency's attempt to withhold names and addresses of employees under FOIA exemption 6 from the unions which were the exclusive representatives of the employees' bargaining units. In reaching this conclusion, the court held that it must balance the following four factors: (1) the plaintiff's interest in disclosure; (2) the public's interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information. *Id.*, at 1494.

Under the first factor, the court distinguished commercial from non-commercial interests, noting that a commercial interest generally should *not* weigh in favor of disclosure. *Id., citing Minnis*, 737 F.2d at 787 (upholding denial of access to Forest Service mailing list to lodge owner). Weighing heavily on the public interest side, however, was a Labor statute, 5 U.S.C. § 7101(a)(1), which the court found "militated strongly in favor of disclosure." *Id.*, at 1495.

In this case, as in *FLRA*, the government argues that the first two factors should be eliminated from the formula following the Supreme Court's decision in *Reporters*. In *Reporters*, a CBS News correspon-

dent sought FBI rap sheets on four individuals suspected of involvement in organized crime. The FBI withheld disclosure under FOIA exemption 7(c) which strictly limits disclosure of investigatory records "compiled for law enforcement purposes." Although exemption 6 was raised as an alternative ground for non-disclosure, the Court expressly declined to address exemption 6, *Reporters*, 489 U.S. at 763 n.12, and further, outlined several differences between exemption 6 and 7(c). *Id.*, at 757. However, in its general discussion of FOIA, the Court noted that "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Id.*, at 771. Thus, in relying on *Reporters*, the government does not dispute that plaintiff has a non-commercial interest in obtaining the mailing list, but contends that the nature of plaintiff's interest should play no part in the analysis.

Although the government's argument finds support in several circuit courts as well as in Judge Fernandez' dissent in *FLRA*, the Ninth Circuit specifically acknowledged the Court's "broad statements" about FOIA in *Reporters* and found the case sufficiently distinguishable to justify continued reliance upon its own four-factor test, including the first factor regarding the nature of the plaintiff's interest in disclosure.[2] 958 F.2d at 1493, n.2, 1495. Thus, the

[2] I recognize that the Ninth Circuit's decision in *FLRA*, 958 F.2d 1490 is part of a nationwide split amongst the Circuit Courts regarding disclosure of employees' home addresses to union representatives and bargaining units. *See FLRA v. U.S. Dept. of Defense*, 984 F.2d 370, 372 (10th Cir. 1993) (describing division of 3rd, 5th and 9th from 7th, 6th and 10th circuits). In March of 1993, the Supreme Court granted certiorari in *FLRA v. U.S. Dept. of Defense*, 975 F.2d 1105 (5th Cir. 1992).

However, because the Ninth Circuit has issued a final decision, I may not consider the government's claim that the case is "wrongly decided," nor would I speculate on the possible outcome of the Supreme Court's grant of certiorari on a related case from another jurisdiction.

Ninth Circuit's 4-factor test applies and the privacy interest in names and addresses is "minimal."[3] Even if the Ninth Circuit's analysis is ultimately challenged, even a minimal privacy intrusion must still be balanced against the "preservation of the basic purpose of the [FOIA] to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 373.

(1) Plaintiff's Interest in Disclosure

Plaintiff argues that disclosure would serve its interest by providing information about the geographic reach of the BLM's information net and the nature and extent of the BLM's dissemination activities. However, such an inquiry could readily be answered by the BLM with statistical information regarding the number of individuals on its mailing list along with a list of cities and zip codes.

[3] For these reasons, and others, the government's significant reliance upon *National Ass'n of Retired Federal Emp. v. Horner*, 879 F.2d 873 (D.C. Cir. 1989) ("*NARFE*") in support of its motion for summary judgment is misplaced. First, the D.C. Circuit found that the privacy interest of an individual in his or her name and address is "significant," misciting the Ninth Circuit's decision in *Minnis*, 737 F.2d at 787, as supporting the proposition. Second, although the case involved FOIA exemption 6, the D.C. Circuit court found that *Reporter* compelled a finding that the identity of the requesting party is irrelevant to both the public and private interest inquiry. *NARFE*, 879 F.2d at 875. Finally, the list of retirees and their addresses was not a "mailing list" *per se*.

Plaintiff's more compelling claim to the list is its desire to "educate" and influence those on the list by presenting its own views and information to a select audience.

(2) Public Interest

Plaintiff relies upon the general interest in "an informed citizenry," citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).[4]

The one reported decision which directly supports plaintiff's desire to promote an informed citizenry is *Southern Utah Wilderness Alliance, Inc. v. Hodel*, 680 F. Supp. 37 (D.D.C. 1988), a case in which a non-profit environmental group sought to compel the Department of Interior to disclose names and addresses from trail-head registers and special use permit lists. The district court noted that park visitors "obviously" had an "ardent interest" in the welfare of the park system so that providing plaintiff with their names and addresses arguably served a public interest by "maintaining a citizenry concerned and informed about the parks and the actions of the Department." *Id.*, at 40.

While I find some merit to this analysis, I am also cognizant of the alternative view that mailing lists actually reveal very little, if anything, about the inner workings of government—the primary target of the FOIA amendment. *See FLRA v. U.S. Dept. of Defense*, 984 F.2d at 375 (5th Cir. 1993) (disclosure of home addresses has "nothing" to do with FOIA's interest in public scrutiny of government).

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[4] The isolated reference to the public interest in *Robbins Tire* adds little to this case, since the Court denied disclosure of prehearing witness statements under FOIA exemption 7, reasoning that FOIA should not be used as a "discovery tool."

Accordingly, when I weigh the public's interest in the balancing proscribed by the Ninth Circuit, I find little support for that side of the equation beyond FOIA's general presumption against withholding information.

(3) The Degree of the Invasion of Personal Privacy

As noted previously, a privacy interest in a list of names and addresses will generally by minimal. *FLRA*, 958 F.2d at 1496. While there may be instances in which the fact that one belongs on a list may itself by embarrassing or private, neither party raises that factor in this case.

The government's primary argument is that, once disclosed, persons on the list may be subject to an unwanted barrage of mailings. However, one significant difference between this case and other cases which analyze disclosure of names and addresses under FOIA exemptions is that the list sought here is a mailing list in which the majority of people have initiated the receipt of mailings from the BLM. In *NARFE*, *FLRA*, and other labor cases under FOIA, private and non-profit groups sought employee rosters. Thus, by way of contrast, persons included on the BLM mailing list have already opened their mail boxes to the receipt of information about BLM activities to a certain extent. Thus, I find that the privacy interests implicated in this case are minimal to an even greater degree than that recognized in *FLRA*.

(4) Alternative Means

Plaintiff contends, and the government does not dispute, that plaintiff has no viable alternative means of obtaining the requested information.

Both parties in this action have provided several cogent reasons for why *Reporters* and *FLRA* are distinguishable from this case and I have kept those distinctions in the forefront of my analysis. Two points merit emphasis: *Reporters* addressed a 7(c) exemption for law enforcement files of individuals and *FLRA* hinged in large measure upon the court's finding of a significant public interest in collective bargaining as expressed by a separate labor statute. I find both cases significantly distinguishable because, unlike *Reporter* in which the privacy interests were significant and unlike *FRLA* where the public interests were significant, in this case I find that both sides barely tip the scales.

I note that the only decision I was able to find addressing facts analogous to this case is the District of Columbia decision in *Southern Utah Wilderness Alliance*, a decision which the government urges I disregard since it predates *Reporters*. Although the decision predates *Reporters*, I find that *Southern Utah* is consistent with current Ninth Circuit analysis of FOIA exemption issues. I find that Judge Gesell appropriately recognized that although the plaintiff and public may have some minimal interest in the disclosure of addresses to parties interested in national parks, the more critical question is the nature and extent of the invasion of privacy. Given the circumstances in this case, I find that the intrusion is extremely minimal and does not constitute a "clearly unwarranted invasion of privacy." Based on the foregoing and in light of the fact that disclosure under FOIA is the rule rather than the exception, I find that the government has failed to meet its burden of justifying non-disclosure under FOIA exemption 6.

CONCLUSION

Based on the foregoing, I find that exemption 6 is inapplicable to disclosure of the *BLM News* mailing list. Accordingly, defendant's motion for summary judgment #4 is denied and plaintiff's cross-motion for summary judgment #10 is granted.

DATED this 18 day of November, 1993.

/s/ MALCOLM F. MARSH
MALCOLM F. MARSH
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CIVIL NO. 93-895-MA

OREGON NATURAL DESERT ASSOCIATION, PLAINTIFF

v.

D. DEAN BIBLES, OREGON STATE DIRECTOR,
BUREAU OF LAND MANAGEMENT, DEFENDANT

[FILED: NOV. 18, 1993]

ORDER

MARSH, Judge.

In accordance with my opinion filed on this date, defendant's motion for summary judgment #4 is denied and plaintiff's cross-motion for summary judgment #10 is granted.

DATED this 18 day of November, 1993.

/s/ MALCOLM F. MARSH
MALCOLM F. MARSH
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CIVIL NO. 93-895-MA

OREGON NATURAL DESERT ASSOCIATION, PLAINTIFF

v.

D. DEAN BIBLES, OREGON STATE DIRECTOR,
BUREAU OF LAND MANAGEMENT, DEFENDANT

[FILED: Dec. 6, 1993]

JUDGMENT

In accordance with the Court's Order and Opinion of November 18, 1993, it is hereby ORDERED AND ADJUDGED that

1. Plaintiff's motion for summary judgment is granted and defendant's cross motion for summary judgment is denied;

2. Defendant shall produce for plaintiff documents requested in plaintiff's August 13, 1992, Freedom of Information Act request;

3. The Court will retain jurisdiction to consider any request for fees and costs.

/s/ MALCOLM F. MARSH
MALCOLM F. MARSH
United States District Judge

Dated this 6 day of Dec., 1993.

Presented by:

/s/ MICHAEL AXLINE
MICHAEL AXLINE
Attorney for Plaintiff

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35150

DC No. CV-93-00895-MFM

OREGON NATURAL DESERT ASSOCIATION,
PLAINTIFF-APPELLEE

v.

D. DEAN BIBLES, OREGON STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, DEFENDANT-APPELLANT

[FILED: AUG. 7, 1996]

ORDER

Before: SCHROEDER, REINHARDT, and FERNANDEZ, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.